

ATTACHMENT C

Calculation of Penalty per SWRCB
Water Quality Enforcement Policy

Calculation of Penalty per SWRCB Water Quality Enforcement Policy

The proposed administrative civil liability was derived following the State Water Resources Control Board's Water Quality Enforcement Policy (Enforcement Policy). The proposed administrative civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

Each factor of the Enforcement Policy and its corresponding score for the violation is presented below:

Calculation of Penalty for Violation

Step1. Potential for Harm for Discharge Violations

This step is not applicable.

Step 2. Assessment for Discharge Violations

This step is not applicable.

Step 3. Per Day Assessment for Non-Discharge Violations

The "per day" factor is calculated for each non-discharge violation considering the potential for harm and the extent of the deviation from the applicable requirements.

Potential for Harm

The Enforcement Policy requires a determination of whether the characteristics of the violations resulted in a minor, moderate, or major potential for harm or threat to beneficial uses.

The Discharger has failed to submit at least one Farm Evaluation as required by the East San Joaquin Order. By not submitting the evaluation, the Discharger has undermined the Coalition's efforts to analyze and report its members' Farm Evaluation data to the Board. The Discharger has therefore reduced the value of the Coalition's Farm Evaluation analysis and caused harm to the Irrigated Lands Regulatory Program.

Staff has determined that the potential for harm is moderate, because the characteristics of the violation present a substantial threat to beneficial uses, and the circumstances of the violation indicate a substantial potential for harm. The reporting of management practices in the Farm Evaluations will allow the Coalition and Board to effectively implement the Management Practices Evaluation Plan. This plan is a critical component of the Board's effort to address agricultural waste discharges and protect beneficial uses, including groundwater as a source of drinking water.

The Discharger operates a large farm operation of 271 acres. The greater the size of the operation, the greater the potential harm, since the missing Farm Evaluation cannot account for management practices used over a larger irrigated lands area. This

creates a larger missing data set in the Coalition's Farm Evaluation analysis and causes a proportionally greater undermining of this analysis.

Additionally, the regulatory program is compromised when staff resources are directed toward bringing Coalition members into compliance rather than being available for outreach and assistance with regulatory compliance.

Deviation from Requirement

The Enforcement Policy requires determination of whether the violation represents either a minor, moderate, or major deviation from the applicable requirements.

The deviation from requirement is major. To date, the Discharger has disregarded the regulatory requirement and rendered this requirement ineffective.

The Discharger has undermined the efforts of the Central Valley Waters Board's Irrigated Lands Regulatory Program and the Coalition's efforts to comply by disregarding the requirement to submit the 2015 Farm Evaluation. A Coalition member's compliance with reporting requirements is foundational to the Board's efforts to protect water quality. The Irrigated Lands Program Orders adopted by the Board specify the expectations and requirements for water quality protection. The requirements in the applicable Orders are rendered ineffective when Coalition members fail to meet their reporting requirements.

Table 3 of the Enforcement Policy prescribes a per day factor ranging from 0.40 to 0.70 for those violations in which the potential for harm is moderate and the deviation from requirement is major. Based on the above factors, a per day factor of 0.45 is appropriate (see Table 3 on pg. 16 of the Enforcement Policy).

Multiple Day Violations: Pursuant to the East San Joaquin Order, the Discharger was required to submit the 2015 Farm Evaluation on 1 March 2016. As of 8 August 2016, this Farm Evaluation is 160 days past due.

Violations under Water Code section 13268 are assessed on a per day basis. However, the violations at issue qualify for the alternative approach to penalty calculation under the Enforcement Policy (page 18). Under this approach, for violations that last more than thirty (30) days, the daily assessment can be less than the calculated daily assessment, provided that it is no less than the per day economic benefit, if any, resulting from the violation. For these cases, the Central Valley Water Board must make express findings that the violation: (1) is not causing daily detrimental impacts to the environment or the regulatory program; or (2) results in no economic benefit from the illegal conduct that can be measured on a daily basis; or (3) occurred without the knowledge or control of the violator, who therefore did not take action to mitigate or eliminate the violation. If one of these findings is made, an alternate approach to penalty calculation for multiple day violations may be used.

Here, the Central Valley Water Board finds that the Discharger's failure to submit a Farm Evaluation is not causing daily detrimental impacts to the environment or the regulatory program. There is no evidence that the Discharger's failure to submit the 2015 Farm Evaluation has detrimentally impacted the environment on a daily basis, since submitting these evaluations does not result in immediate changes in practices that could be impacting water quality. There is no daily detrimental impact to the regulatory program because information that would have been provided by the Discharger pursuant to the regulatory requirements would have been provided on an intermittent, rather than daily basis.

Moreover, the Discharger's failure to submit the 2015 Farm Evaluation results in no economic benefit that can be measured on a daily basis. Rather, the economic benefit here is associated with costs of preparing the evaluations, which are outlined in Step 8 below.

Either of the above findings justifies the use of the alternate approach to penalty calculation for multiple day violations. The minimum numbers of days to be assessed under the alternate approach for the 2015 Farm Evaluation is 12 days. However, because this approach generates a Total Base Liability Amount that is not a sufficient deterrent, and because the Discharger's inaction undermines the Central Valley Water Board's ability to protect water quality through its regulatory program, the Prosecution Team has increased the number of days of violation to 20.

Initial Liability Amount

The initial liability amount for the violations calculated on a per-day basis is as follows:

$$\$1,000/\text{day} \times 20 \text{ days} \times 0.45 = \$9,000$$

Total Initial Liability Amount: \$9,000

Step 4. Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator's culpability, efforts to clean up or cooperate with regulatory authority, and the violator's history of violations. After each of these factors is considered for the violations involved, the applicable factor should be multiplied by the proposed amount for each violation to determine the revised amount for that violation.

a) *Culpability:* 1.3

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for intentional or negligent behavior. The Discharger was given the score of 1.3 for the culpability factor. As a member of the Coalition, it is the Discharger's responsibility to be aware of, and to comply with, the reporting requirements of the East San Joaquin Order. The Coalition sent the Discharger multiple notices urging the submittal of the 2015 Farm Evaluation.

Additionally, Board staff sent a Notice of Violation (NOV) to the Discharger on 22 February 2016, and a certified mail return card was received indicating that the NOV was delivered to the Discharger's address. The NOV urged submittal of the missing Farm Evaluations in order to avoid potential enforcement action. Although the Discharger may not be required to submit the 2013 and 2014 Farm Evaluations, the NOV was received just days before the 2015 Farm Evaluation was to be submitted to the Coalition.

Despite knowledge of the regulatory requirements, the Discharger failed to come into compliance by submitting the 2015 Farm Evaluation.

b) *Cleanup and Cooperation: 1.3*

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given the score of 1.3. The Coalition issued multiple notices, and the Central Valley Water Board issued the Discharger an NOV, which emphasized the importance of submitting Farm Evaluations and the potential for enforcement for failure to do so. The Discharger did not respond and cooperate with the Central Valley Water Board or the Coalition despite being allowed ample time in which to do so. Despite opportunities to come into compliance, the Discharger did not make any attempt to cooperate. Cleanup is not applicable in this case.

c) *History of Violations: 1.0*

When there is a history of repeat violations, the Enforcement Policy requires a minimum multiplier for 1.1 to be used. The Discharger was given the score of 1.0, as there is no evidence of a history of violations.

Step 5. Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Initial Liability Amount determined in Step 3.

a) *Total Base Liability Amount: \$15,210*

Initial Liability (\$9,000) x Adjustments (1.3)(1.3)(1.0) = \$15,210

Step 6. Ability to Pay and Continue in Business

As per the Enforcement Policy, "[t]he ability of a Discharger to pay an ACL is determined by its revenues and assets." The Discharger appears to have the ability to pay the Base Liability Amount based on ownership of a farm management company.

The Discharger would have a share of the revenues generated from the 271 acres the Discharger operates. ~~The farmland the Discharger operates is used for unidentified row crops, with the exception of Merced County Assessor's Parcel Number 049-080-016. Aerial photos imagery shows this parcel to be an established 39-acre almond orchard. The revenues from the row crops are certainly substantial, although not quantifiable with the current information available to Board staff. Based on the Discharger's reporting of acreage and crop type on its enrollment form when it joined the Coalition, the Discharger operates 233 acres of sweet potatoes and 38 acres of almonds.~~ The Prosecution Team estimates that revenues from the almond orchard total ~~\$266,198-3,138,336~~ per year. This estimate is based on the most recent Merced County Crop Report,¹ which shows that almond orchards generated about \$6,826 per acre ~~and sweet potatoes generate about \$X,XXX12,356 per acre.~~ Thus, the Discharger has the ability to pay the proposed administrative civil liability and there are no factors under this category that warrant an adjustment.

Step 7. Other Factors as Justice May Require

If the Central Valley Water Board believes that the amount determined using the above factors is inappropriate, the amount may be adjusted under the provision for "other factors as justice may require" but only if express findings are made.

The costs of investigation and enforcement are "other factors as justice may require," and could be added to the liability amount. The Central Valley Water Board Prosecution Team has incurred a significant amount of staff costs associated with the investigation and enforcement of the violations alleged herein. While staff costs could be added to the penalty, the Prosecution Team, in its discretion, is electing not to pursue staff costs in this matter.

There are no other factors under this category that warrant an adjustment.

Step 8. Economic Benefit

Economic Benefit: \$522

The economic benefit of noncompliance is any savings or monetary gain derived from the act or omission that constitutes the violation. Economic Benefit was calculated using the United States Environmental Protection Agency's (US EPA) Economic Benefit Model (BEN)² penalty and financial modeling program, version 5.4.0. BEN calculates a discharger's monetary interest earned from delaying or avoiding compliance with environmental statutes.

¹ The 2014 Merced County Crop Report can be found online here:
<https://www.co.merced.ca.us/ArchiveCenter/ViewFile/Item/473>

² US EPA Economic Benefit Model, or BEN. At the time this document was prepared, BEN was available for download at
<http://www2.epa.gov/enforcement/penalty-and-financial-models>.

The BEN model is the appropriate tool for estimating the economic benefit in this case. The benefit is calculated by identifying the regulation at issue, the appropriate compliance action, the date of noncompliance, the compliance date, and the penalty payment date.

The violation described in the Complaint identifies the avoided cost of preparing the 2015 Farm Evaluation, which has benefited the Discharger.

For the purposes of determining the economic benefit, Board staff assumed that it would take a person knowledgeable with the Discharger's farm operations, such as a farm manager or a crop advisor, about two hours per farm operation to complete the Farm Evaluation for a given year. The Discharger is the operator at nine parcels divided into four groups of contiguous parcels. Staff assumed each group is a separate farm operation. Using an estimate of the value of the knowledgeable person's time of \$120 per hour, the economic benefit of this avoided cost per Farm Evaluation is:

$$4 \text{ operations} \times 2 \text{ hours/operation} \times \$120/\text{hour} = \$960$$

Therefore, the estimated cost for the 2015 Farm Evaluation is \$960.

In summary, the cost avoided by the Discharger is estimated at \$960. The actual economic benefit realized is derived by adjusting the avoided costs for inflation and tax deductibility. Using the BEN model, the total economic benefit of noncompliance was determined to be \$522.

Step 9. Maximum and Minimum Liability Amounts

*a) Minimum Liability Amount: **\$575***

The Enforcement Policy recommends that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team calculated the Discharger's economic benefit obtained from the violations cited herein to be \$522. This number plus ten percent results in a recommended Minimum Liability of \$575.

*b) Maximum Liability Amount: **\$160,000***

The maximum liability under Water Code section 13268 for the failure to furnish a report under Water Code section 13267 is \$1,000 per each day the violation occurs. The Discharger was required to submit the 2015 Farm Evaluation on 1 March 2016. As of 8 August 2016, the Farm Evaluation is 160 days past due. The total maximum liability is therefore one hundred and sixty thousand dollars (\$160,000).

Step 10. Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for failure to submit the 2015 Farm Evaluation is fifteen thousand two hundred and ten dollars **(\$15,210)**.